at some future time. The proposed rule will create a diminution of value. Property owners will be economically impacted if neighbors are free to install unsafe, highly visible media monstrosities on their lot lines in the front yards. The average home buyer will not purchase, or at least not pay full market value for property that is negatively impacted by dangerous and unsightly conditions on neighboring land. Moreover, the federal interest in promoting satellite reception is less valuable to our society than the protection of life and safety. Dead men do not watch television.

B. The Federal Government cannot do Indirectly that which it cannot do Directly

The judiciary honors the timeless legal maxim that the government may not do indirectly, that which it cannot do directly. *Indiana State Employees v. International Republican State Central Committee*, 630 F.Supp. 1194, 1196 (1986). This precludes state or federal governments from taking away the value of a citizen's land without offering compensation. U.S. Const., amend V. Likewise, a government agency should not be able to vest a citizen with the power to deprive another citizen of property value, and subsequently escape the Constitution's "just compensation" mandate. U.S. Const., amend V.

The FCC expresses its goal of promoting access of the general public to satellite communications at their homes and businesses. The FCC declares a federal interest in facilitating the installation of satellite communications media without any local obstruction. Clearly, the proposed rule is a federal action designed to advance the FCC's stated objectives. Equity and the United States Constitution demand that where an agency

authorizes a private party to interfere with the use of his neighbor's land, *in furtherance of a stated federal interest,* the benefitting government must compensate the injured neighbor.

There is a recent trend among federal and state governments to codify the requirement of compensating landowners where an agency has limited the use of private property, subsequently diminishing the property's value, in whole or in part. *See generally*, H.R. 925, 104th Cong., 1st Sess. (1995); AL H.B. 498, Reg. Sess., (1995). The judiciary has concluded that a private property owner must be compensated, even where the asserted taking supports a "weighty public interest." *Nixon v. U.S.*, 978 F.2d 1269, 1275 (D.C. Cir. 1992). In *McDougal v. County of Imperial*, the Ninth Circuit applied Supreme Court precedent mandating that the judiciary must "balance the strength of the public interest against the severity of the private deprivation" in all takings analyses. 942 F.2d 668, 676 (9th Cir. 1991). Therefore, even if in preempting local zoning ordinances the FCC advances the asserted federal interest in communications, the Commission should not be able to escape liability to the landowners if its preemption rule injures private property through a deprivation of value or use. In removing the current protection afforded property owners by local building, zoning and safety ordinances, the FCC perpetuates the loss in value and use of private property suffered by the neighbor of the satellite dish owner. The proposed rule grants satellite users virtual carte blanche to erect a dish at any location they choose, without regard to the effect of their actions on the use, enjoyment, and value of their neighbors' land.

IV. IMPLEMENTATION OF THE PROPOSED RULE WILL CAUSE A PROLIFERATION OF LITIGATION

A. State and Local Governments will be Sued by Citizens for Taking Private

Property Pursuant to 42 U.S.C. § 1983, while the FCC will avoid Accountability and Liability

Title 42, section 1983 provides that "Every person who, under color of any . . . *ordinance* of any State or Territory . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, . . . shall be liable to the party injured . . . . " The courts routinely recognize § 1983 suits brought by citizens against municipalities on the basis of allegedly injurious zoning ordinances. See, *Loschiavo v. City of Dearborn, 33 F.3d 548 (6th Cir. 1994)* (holding satellite antenna owners had § 1983 claim against city to enforce their rights under FCC rule); *Winter Creek Apartments v. City of St. Peters,* 682 F.Supp. 989 (E.D. Mo. 1988), (finding city may be held liable for taking private land in § 1983 action). If local governments fail to amend their laws to comply with the liberal FCC rule, and attempt to enforce these local laws as written, satellite dish owners will undoubtedly sue the municipality. Alternatively, if the municipality amends its local zoning regulations in conformance with the FCC's unnecessarily permissive regulatory scheme, distressed landowners whose property has been devalued by a neighbor's irresponsible, yet federally sanctioned, installation of a satellite dish, may seek redress against the municipality, through a § 1983 action, for permitting a taking of their property under color of the amended municipal ordinance.

Since § 1983 suits do not operate against the federal government (see express language of 42 U.S.C. § 1983), the FCC escapes all liability under that statute. The FCC forces municipalities to modify their zoning regulations to reflect the agency's policy, which in turn subjects these municipalities to liability when these ordinances work to deprive land

owners of property rights. Thus, the FCC is free to promulgate careless regulations, without concern for its personal accountability. Furthermore, federal case law suggests that the FCC may be shielded from liability in an inverse condemnation action. *See, cf., Griggs v. County of Allegheny, PA*, 369 U.S. 84, 87-89 (1962) (finding county liable for taking "superadjacent" airspace which negatively impacted plaintiff's property use, and releasing CAA from joint liability) (*followed in DiPerri v. FAA*, 671 F.2d. 54, 57 (1st Cir. 1982)). As in a § 1983 suit, the municipalities may be liable because their ordinances -- amended to reflect the FCC's proposed rule -- authorize an inverse condemnation of private property neighboring a satellite dish customer.

B. The Proposed Rule will Breed Discord Between Neighbors who will Clog the Courts with § 1983 and Nuisance Claims against One Another

Assuming that the federal government grants landowners carte blanche to erect satellite dishes with virtually no restrictions and in any location, injured property owners will still seek legal relief. Once the proposed preemption rule is adopted, neighbors will be forced to sue satellite dish users, whose use damages neighboring property, under a tort theory of nuisance. A nuisance suit lies where a defendant maintains a condition on his property that interferes with the use and enjoyment of plaintiff's land. Cunningham, et al., at § 7.2 *supra*. Moreover, since the local ordinances will presumably be modified to comply with the proposed rule, a satellite dish user will be acting under color of local law when he installs a dish in a manner that injures his neighbor. Section 1983 actions brought by neighbors against neighbors will clog state and federal courts.

Unlike thoughtful zoning ordinances which require review and approval prior to construction, the proposed rule will encourage protracted litigation after the damage has been done. Local zoning ordinances balance the needs and desires of neighbors and effectuate compromise by providing safety and aesthetic parameters. In most instances, zoning ordinances do not prohibit Neighbor A's use of a satellite dish. Unlike the proposed rule, such zoning ordinances merely ensure that Neighbor A's use will not unreasonably interfere with Neighbor B's use and enjoyment of his land.

V. THE FCC'S PROPOSED RULE IMPOSES AN UNFUNDED MANDATE ON STATE AND LOCAL GOVERNMENTS AND NEGATIVELY IMPACTS LOCAL BUDGETS

On March 22, the President signed the "Unfunded Mandate Reform Act of 1995" into law. PL 104-4, March 22 1995. This law expresses a congressional desire to "curb the practice of imposing unfunded Federal mandates on . . . local governments; . . . and to ensure that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal . . . regulations . . . ." 109 Stat. 48. The law defines "direct costs" to local governments as:

> . . . [T]he aggregate estimated amounts that all . . . local . . . governments would be *required to spend* or would be *prohibited from raising* in revenues in order to comply with the Federal intergovernmental mandate . . . .

Id. at 50, § 421(3)(A)(i) (emphasis added). The term "Federal intergovernmental mandate" applies to "any provision in [a] . . . regulation that -- would impose an enforceable duty upon . . . local governments." *Id.* at 51, § 421(5)(A)(i).

A. The Rule Restricts Local Governments' Ability to Collect Reasonable Permit Fees that Cover Costs for Services

State law requires that permit fees be cost based, however, the proposed FCC rule denies local governments their historical right to recoup their basic costs for services through inspection and permit fees. A reasonable fee is one that covers the local government's actual costs. Amazingly, the contemplated rule prohibits state and local governments from charging even *reasonable* fees, if the FCC deems such fees to be "substantial". *FCC Report* 95-180, para. 58 (May 15, 1995). The FCC declares that the nebulous test of substantiality is not tied to the concept of reasonableness; rather it is a "low threshold." *Id.* Thus, local governments must not only tolerate the degradation and endangerment of their communities via unregulated installation of satellite dishes, they must adjust their local budgets to pay for this intrusion, since the FCC forbids them the recovery of actual costs if the agency finds the fee "reasonable" yet "substantial." (The phrase "adding insult to injury" comes to mind).

The proposed rule is a federal intergovernmental mandate, as that it will limit municipalities' ability to raise revenues. Congress enacted the Unfunded Mandate legislation to remedy the tendency of the federal government to shift costs to local governments, forcing "local governments to raise property taxes or curtail sometimes essential service" thereby "*threaten[ing] the ability of many citizens to attain and maintain the*

American dream of owning a home in a safe, secure community." 109 Stat. 48, 63, § 106(a)(2)-(3) (emphasis added).

B. The Cost of Litigation and Amending all Local Ordinances to Comply with the Proposed Rule will be Substantial

Beyond the restrictions that this proposed rule places on municipalities' revenue raising abilities, the increased liability of the municipality in inverse condemnation and § 1983 actions brought by injured property owners, coupled with the proliferation of private § 1983 and nuisance suits between citizens (*see* discussion, *infra*, at Part IV), will have a tremendous impact on local budgets. Furthermore, the administrative costs of amending all local zoning ordinances to comply with the FCC proposed rule will be substantial. Title II of the Unfunded Mandate Act provides that, as a part of regulatory accountability, where a mandate may result in an aggregate expenditure by State or local governments, or by the private sector, of $100,000,000 or more, the agency must draft a written statement including:

> . . . a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to state, local, and tribal governments or the private sector, as well as *the effect of the Federal mandate on health, safety, and the natural environment* . . . .

109 Stat. 48, 64, § 202(a)(2) (emphasis added).

The administrative costs of compliance with the proposed rule by the 23,000 local units of government will undoubtedly impair both the local and national economy. Furthermore, the costs incurred by personal injuries and property damage nationwide will be exorbitant.

VI. THERE ARE LESS BURDENSOME ALTERNATIVES AVAILABLE TO THE FCC THAT EFFECTUATE THE PURPOSE OF THE COMMUNICATIONS ACT

The Communications Act imposes a duty on agencies to consider alternate regulations, and to "select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule . . . 109 Stat. at 66, § 205(a). The current rule adequately balances federal and local interests. Current FCC Rule 25.104 is a less burdensome and more cost effective means of effectuating the Commission's goals than is the proposed rule. The existing limited preemption of local zoning limitations strikes a more realistic balance between local and federal concerns. The proposed rule strips municipalities of their traditional police power to attend to the welfare of their citizens, while placing the FCC outside the realm of accountability for any negative consequences. Our nation cannot afford the aggregate costs of such a broad and reckless mandate.

VII. IF THE FCC PREEMPTS ALL LOCAL BUILDING AND ZONING ORDINANCES AND REASONABLE COST BASED FEES, AS PROPOSED BY THE NPR, IT MUST PROTECT THE LOCAL INTERESTS

A. Safety and Property Interests Require Enforcement of Front Yard and Set Back Requirements and Building Code Requirements

For all of the reasons set forth above, total preemption of front yard and set back requirements as well as building code requirements is irresponsible. The proposed rule must not go to that extreme and the FCC should, at minimum, revise the proposed to allow local municipalities to prohibit satellite dish installations in the front yards and with any reasonable distance of property lines. In addition, the rule should require that all satellite

dish construction comply with the otherwise applicable local building and construction code requirements. These modifications will enhance the ability of the municipality to protect the safety of its citizens as well as lessen the diminution of property values that would otherwise occur due to the proposed rule in its current addition.

B. Cost Based Fees Must Be Permitted in Order to Protect Local Budgetary Interests

The FCC should also revise the proposed rule to permit local municipalities to collect reasonable cost based permit and inspection fees. This is necessary to permit payment of the cost attributable to the satellite dish industry by those who beneift fromthe new technology instead of transfering that cost to the taxpayers generally.

Respectfully submitted,

City of Detroit, City of Allegan, City of Belding, City of Buchanan, City of Cedar Springs, City of Coldwater, City of East Grand Rapids, City of East Tawas, City of Escanaba, City of Fremont, City of Garden City, City of Grand Haven, City of Grandville, City of Hudsonville, City of Kentwood, City of Livonia, City of Lowell, City of Marquette, City of Milan, City of Niles, City of Otsego, City of Rockford, City of Saline, City of Tawas City, City of Walker, City of Wyoming, City of Zeeland, Alabaster Township, Alpine Charter Township, Au Sable Charter Township, Baldwin Township, Benton Charter Township, Byron Township, Gaines Charter Township, Georgetown Charter Township, Grand Rapids Charter Township, Harrison Charter Township, Oscoda Township, Plainfield Charter Township, Sheridan Charter Township, Tilden Township, Van Buren Charter Township, Whitewater Township, Yankee Springs Township, Zeeland Township, Village of Chelsea, Village of Dexter and the City of Arlington, Texas (collectively "Michigan and Texas Communities").

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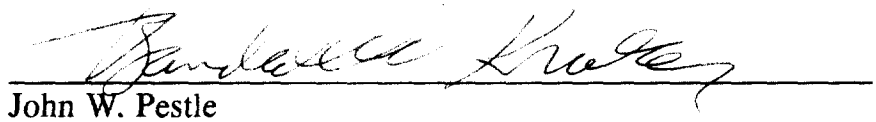

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